

STATE OF MAINE  
SAGADAHOC, SS.

BUSINESS AND CONSUMER COURT  
LOCATION: WEST BATH  
DOCKET NO.: CV-07-03

JAMES CLIFFORD, ET AL,

Plaintiffs

v.

ORDER AMENDING DECISION AND ORDER  
AND APPOINTING REFEREE

STEVEN CASE, ET AL,

Defendants

In its Decision and Order, dated May 20, 2009, the court ordered the dissolution and winding up of Global Insurance Resources, LLC ("GIR"). Although the court is statutorily authorized to wind up a limited liability company upon dissolution, in this case the court concluded that the transfer and apparent co-mingling of assets and/or liabilities as between GIR and Defendant Case Professional Resources ("CPR") after June 27, 2006 rendered it impracticable for the court to identify GIR's assets and liabilities, if any, such that the liquidation process could be undertaken. *See* 31 M.R.S. § 703. In order to address this problem of proof and procedure, the court authorized the designation of a liquidating trustee. As ordered, the parties each timely submitted the names of two persons that they recommended to the court for appointment as trustee.

In addition, the court directed Defendants Case and CPR to prepare and file a full accounting.<sup>1</sup> Given the complexity of the issues relating to tracing GIR's assets and liabilities,

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<sup>1</sup> In relevant part, Defendants Case and CPR were ordered to "file a full accounting" of

- (a) All of the assets and liabilities of GIR that were transferred to CPR on or about June 27, 2006, including any substitutions or replacements of those assets that occurred at any time on and after June 27, 2006;
- (b) The current status and values of those assets, and of any substitutions or replacements, that remain under the custody and control of CPR or any of its members;

an accounting was authorized in order to assist the Liquidating Trustee in his or her task.<sup>2</sup> As ordered, Case and CPR filed an accounting, including a summary in which they concluded that “GIR is hopelessly insolvent” and noted that it had assets of \$8,605 and liabilities of \$1,539,650. *See* Letter of George J. Marcus, Esq., dated June 29, 2009 at 4. In response, Plaintiffs have challenged the sufficiency and accuracy of that accounting, alleging that Defendants have “misstated or willfully ignored the law and made materially incorrect statements.” *See* Pls’. Objections to Defendants Accounting at 1.

Based upon the foregoing, the court has not yet appointed a trustee because of a concern that GIR does not or might not have available to it any resources, or sufficient resources, to reimburse a trustee for winding up the company.<sup>3</sup> The court is also convinced that none of the parties would voluntarily undertake responsibility for those costs and expenses. Accordingly, the court directed counsel to submit memoranda addressing whether or to what extent the court could require either or both of the parties to pay the costs and expenses associated with winding up and dissolving GIR. The court also asked the parties to address whether, in the event it is finally determined that GIR does not have any or sufficient resources, there are any other lawful and appropriate alternatives to the appointment of a trustee under the circumstances of this case.

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- (c) All profits and benefits derived by CPR or any of its members from those assets, and from any substitutions or replacements, on and after June 27, 2006; and
  - (d) Any use, and the value of such use, of GIR’s property by CPR or any of its members on and after June 27, 2006.

Decision and Order at 31, ¶ B(1)(a)–(d).

<sup>2</sup> The court has the authority to order an equitable accounting when necessary to afford complete relief, “when the account is so complicated as to be beyond a court’s ability to decide,” or when specifically authorized by statute. Horton & McGehee, *Maine Civil Remedies* § 8-2 at 201-02 (4th ed. 2004). *See also* 1A C.J.S. *Accounting* §§22 & 23 (1985); 31 M.R.S. § 652 (2) (imposing a duty on managers and members to account to the limited liability company with respect to any benefit or profit derived during the winding up process); and 31 M.R.S. § 753(2).

<sup>3</sup> The court has also noted that “[i]t is undisputed that GIR has held no assets and has not pursued any business activity in its own name since 2006.” Decision and Order at 17.

Plaintiffs responded that the court has equitable authority to require Defendants to advance and, if appropriate, bear the costs and expenses of a liquidating trustee. First, they argue that, based upon the nature of the court's findings in the Decision and Order, it has inherent authority to impose such a burden on Defendants. In particular, Plaintiffs point to the court's order requiring Case and CPR to file an accounting as an exercise of that equitable authority. Pls. Memorandum at 4 (citing *Graffam v. Wray*, 437 A.2d 627,635 (Me. 1981); and *Rosen v. Harris*, 427 A.2d 953, 955 (Me. 1981)). From this premise, they argue that the court is not barred from providing further equitable relief. *Id.*

Second, Plaintiffs assert that the court's authority is also established by Maine law regarding the equitable jurisdiction of the Superior Court "in all cases in which there is not a plain, adequate and complete remedy at law", 14 M.R.S. § 6051(13), and by the law governing limited liability companies. *See* 31 M.R.S. §753(2) ("Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.").

Defendants disagree and counter that there is no legal or equitable authority for the court to impose the costs and expenses of a liquidating trustee upon either party. Rather, they must be borne by the assets and resources of the LLC being wound up and dissolved. In this respect, the court agrees with Defendants. After a review of the parties' argument and after conducting its own research, the court is not satisfied that it is authorized under the statutes governing limited liability companies, the common law, or general principles of equity to impose upon Defendants, who are opposed to the effort, the costs associated with the liquidation of GIR. This is particularly true in light of the fact that the statute seems to provide that those costs are to be borne by the limited liability company. *See* 31 M.R.S. § 706(2).

Notwithstanding the apparent lack of authority regarding the compensation of a liquidating trustee tasked with winding up a seemingly insolvent limited liability company, the court concludes that this problem is not without a solution. As noted in the Decision and Order, judicial dissolution is warranted in this case. As also noted, the complexity of the intermingling of GIR's accounts with those of CPR following Case's premature and unauthorized "winding up" necessitates an accounting in order to properly identify GIR's assets and liabilities, and to facilitate its liquidation. As Plaintiffs have pointed out, albeit in a footnote, this court has broad discretion in the allocation of the costs and expenses of a referee. *See* Pls.' Br. at 4 n.6; and M.R. Civ. P. 53(a).

In light of the present, and seemingly irreconcilable impasse regarding who will bear the costs of the liquidating trustee and, in particular, the costs associated with any investigative action appropriate to the winding up and liquidation of GIR, including the challenged accounting, the court concludes that it will instead refer the accounting issue to a referee pursuant to M.R. Civ. P. 53. *See Maine Civil Remedies* § 8-2 at 201 (citing M.R. Civ. P. 53 and explaining that "[t]he Rules of Civil Procedure allow matters involving complicated accountings to be referred by the court to a referee or master, whose task is to unearth the facts, apply appropriate accounting principles to them, and to make a recommendation on judgment"). Once the referee has completed an inquiry into this matter and filed a report, the court expects that it will then have the information necessary to wind up GIR's affairs, consistent with its authority under Section 703 and quite possibly without the need to appoint a liquidating trustee.

Although the parties have not consented to a reference,<sup>4</sup> the court concludes that it is nevertheless authorized to refer the accounting to a referee pursuant to M.R. Civ. P. 53(b)(2). Moreover, because the reference is made in the context of an account, it is not an extreme remedy requiring a showing of exceptional circumstances. *See id.*; and *McTeague v. James J. MacAdam & MacAdam & McCann, P.A., &*, 2000 Me. Super. LEXIS 180 (Me. Super. Ct. Aug. 11, 2000).

#### DECISION

Based on the foregoing, it is ORDERED, as follows:

- A. Pursuant to M.R. Civ. P. 53(b)(2), the court appoints Active Retired Justice Donald Marden to be a referee in this matter to conduct such investigations, examinations and hearings as the referee deems necessary or appropriate in order to
- (1) Determine the assets, liabilities and net worth of GIR;
  - (2) The sufficiency and accuracy of the accounting filed by Defendants Case and CPR on June 29, 2009 and, if insufficient and/or inaccurate, require such Defendants to prepare and file a correct and accurate accounting; and
  - (3) Report to the court upon the matters submitted to the referee by this order of reference and make findings of fact and conclusions of law;
- B. In order to accomplish the foregoing, the referee shall undertake the duties, responsibilities and tasks hereafter set forth and shall be authorized to do the following:
- (1) To take and exercise all lawful measures to investigate, ascertain, track, and examine the assets and liabilities of GIR, including, but not limited to, those that were transferred to CPR on or about June 27, 2006, and any subsequent substitutions or replacements of those assets that remain under the custody and control of CPR or any of its members and, to this end, to examine the books and records of CPR;

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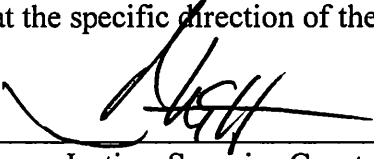
<sup>4</sup> To be clear, the court recognizes that, other than a brief reference to M.R. Civ. P. 53 in a footnote in Plaintiffs' Memoranda, the matter of a reference is raised in this case for the first time in this order, the parties have not in fact had the opportunity to either agree or disagree to a such a process.

- (2) To require such further and periodic accountings and determinations of GIR's assets and liabilities, and any subsequent substitutions or replacements of those assets that remain under the custody and control of CPR or any of its members;
  - (3) To hire such accountants, attorneys and other experts or persons, as the referee shall, in the referee's sole discretion, deem necessary or appropriate in order to fulfill and accomplish the duties, responsibilities and tasks impressed upon the referee in this Order;
  - (4) To prepare and file a report to the court upon the matters submitted to the referee by this order of reference, including findings of fact and conclusions of law, together with the original exhibits and any transcript of the proceedings and of the evidence before the referee, and the cost of such transcript shall be included in the necessary expenses incurred by the referee as provided in M.R. Civ. P. 53(a);
- C. Where necessary and appropriate to any investigations, examinations and hearings conducted by the referee, the parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in M.R. Civ. P. 45.
- D. The referee and any party in this action may at any time, on proper notice to all parties who have appeared in this action, apply to the court for further instructions and for further power necessary to enable the referee to properly fulfill all duties as referee.
- E. Unless otherwise ordered by the court, the referee's report, together with the original exhibits and any transcript of the proceedings and of the evidence before the referee, shall be filed by the referee, with copies sent to all counsel, on or before February 19, 2010.
- F. The referee's compensation, which shall be determined in accordance with 4 M.R.S. § 104-A, and the referee's necessary expenses shall be paid by the State of Maine, as provided in 4 M.R.S. § 501; provided, however, the court may thereafter order either or both of the parties to reimburse the State for all or any part of such payments.
- G. So much of the Decision and Order, dated May 20, 2009, that relates to the appointment and duties of a liquidating trustee is stayed pending the filing and acceptance of the referee's report and pending further order of the court.
- H. Upon final acceptance and adoption of the referee's report, the court shall determine whether there are sufficient resources with which to appoint a liquidating trustee to thereafter wind up and dissolve GIR or, based on a lack of such resources, whether the court shall thereafter wind up and dissolve it.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

"Order Amending Decision and Order and Appointing Referee filed. This Order is incorporated into the docket by reference at the specific direction of the court."

Dated: December 2, 2009

  
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Justice, Superior Court